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No. 82-242

# In the Supreme Court of the United States

OCTOBER TERM, 1982

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ANNE M. GORSUCH, ADMINISTRATOR,
ENVIRONMENTAL PROTECTION AGENCY, PETITIONER

*v.*

SIERRA CLUB and ENVIRONMENTAL DEFENSE FUND

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*ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT*

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## BRIEF FOR THE PETITIONER

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## QUESTION PRESENTED

Whether it was "appropriate," within the meaning of Section 307(f) of the Clean Air Act, 42 U.S.C. (Supp. IV) 7607(f), to award over $90,000 in attorneys' fees and costs to parties who failed to prevail on any aspect of their challenge to rulemaking action taken by the Administrator of the Environmental Protection Agency.*

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* The parties involved in the litigation concerning attorneys' fees are solely those appearing in the caption of the case in this Court. This case began, however, as eight consolidated petitions for review under the Clean Air Act. At that stage of the proceedings, the litigants included a large number of other parties, mostly electric utilities, whose names are collected in Appendix D to the petition.

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## BRIEF FOR THE PETITIONER

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### OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-20a) holding the Administrator liable for attorneys' fees and costs is reported at 672 F.2d 33. The opinion of the court of appeals (Pet. App. 23a-38a) determining the amount of attorneys' fees and costs to be awarded respondents is reported at 684 F.2d 972.

### JURISDICTION

The judgment order of the court of appeals (Pet. App. 39a-40a) was entered on July 16, 1982. The petition was filed on August 11, 1982, and granted on October 18, 1982. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

## STATUTE INVOLVED

Section 307(f) of the Clean Air Act, 42 U.S.C. (Supp. IV) 7607(f), provides in pertinent part as follows:

> In any judicial proceeding under this section, the court may award costs of litigation (including reasonable attorney and expert witness fees) whenever it determines that such award is appropriate.

## STATEMENT

Following a totally unsuccessful challenge to regulations promulgated by the Environmental Protection Agency (EPA), respondents Sierra Club and Environmental Defense Fund (EDF) sought an award of attorneys' fees and costs against the government under Section 307(f) of the Clean Air Act, 42 U.S.C. (Supp. IV) 7607(f). Notwithstanding respondents' failure to prevail on a single issue, the court of appeals ruled that they were entitled to fees and costs. Before discussing the court's ruling on attorneys' fees, we briefly describe the underlying merits litigation.

1. Section 111 of the Clean Air Act, 42 U.S.C. (Supp. IV) 7411, requires EPA to set performance standards limiting emissions from new or modified air pollution sources that reasonably may be anticipated to endanger public health or welfare. In 1979, EPA promulgated revised new source performance standards for coal-fired generators capable of firing more than 250 million British thermal units (MBtu) per hour.[1] The performance standard limited sulfur

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[1] A complete history of the rulemaking is set forth in the court of appeals' merits opinion, *Sierra Club* v. *Costle*, 657 F.2d 298 (D.C. Cir. 1981), and need not be repeated here. As

dioxide ($SO_2$) emissions to a maximum of 1.2 pounds per MBtu. In addition, powerplants with potential, i.e., uncontrolled, $SO_2$ emissions of greater than 0.60 pounds per MBtu were required to reduce such emissions by 90%; powerplants with potential emissions of less than 0.60 pounds of $SO_2$ per MBtu were required to reduce them by no less than 70%.

The Sierra Club, EDF, and industry organizations filed petitions in the United States Court of Appeals for the District of Columbia Circuit for review of the new source performance standards.[2] Sierra Club challenged EPA's action on three grounds: (1) that EPA lacked statutory authority to adopt a "variable" standard for $SO_2$ emissions, i.e., a standard that allowed percentage reductions in emissions ranging from 70% to 90% (*Sierra Club* v. *Costle*, 657 F.2d 298, 316 (D.C. Cir. 1981); (2) that EPA's standard was not supported by the rulemaking record (*id.* at 316-317); and (3) that EPA failed adequately to apprise the public of its intention to adopt a variable reduction strategy, thereby depriving the public of a fair opportunity to comment on the adoption of a

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described by the court of appeals, the final new source performance standards regulated emissions of sulfur dioxide, particulate matter, and nitrogen oxides. Respondents, however, challenged only certain features of the sulfur dioxide standard. Accordingly, we confine our description of the merits litigation to that aspect of the new source performance standards.

[2] Jurisdiction in the court of appeals was properly predicated on Section 307(b)(1) of the Clean Air Act, 42 U.S.C. (Supp. IV) 7607(b)(1), which provides that judicial review of many of the Administrator's actions, including the promulgation of new source performance standards, may be had only in the United States Court of Appeals for the District of Columbia Circuit.

variable standard in the final rule (*id.* at 317-318). EDF challenged the performance standards on only one ground—the alleged procedural impropriety of "ex parte contacts." EDF asserted that a more stringent ceiling was attainable and would have been adopted but for an "ex parte blitz" on EPA after the close of the comment period, during which EPA was pressured not to adopt a more stringent standard (*id.* at 386).

On April 29, 1981, the court of appeals rendered its decision on the merits. *Sierra Club* v. *Costle*, *supra*, 657 F.2d 298, 298. The court rejected all of Sierra Club's claims. First, it concluded that EPA had ample statutory authority to adopt a variable standard (657 F.2d at 318-322). Second, it rejected Sierra Club's charge that the variable standard was without basis in the record. After reviewing the technical background for the standard, the factors considered by EPA in adopting the standard, and examining the Agency's stated rationale, the court held that EPA's action was reasonable (*id.* at 322-352). Finally, the court rebuffed Sierra Club's claim that EPA's adoption of a variable standard was procedurally defective. The court found that the public in general and Sierra Club in particular had fair notice of and opportunity to comment on the Agency's intention to adopt a variable standard (*id.* at 353-356).

EDF fared no better on its claim. The court separated the allegedly improper ex parte contacts into two categories for analytical purposes: (1) written comments submitted after the close of the comment period; and (2) meetings after the close of the comment period with the President and heads of other Executive Branch agencies, congressional representatives, and private parties (657 F.2d at 386-387).

With respect to written comments received after the close of the comment period, the court held that nothing on the face of the Clean Air Act prohibited the Agency from receiving and considering such materials as long as they were placed in the Agency's rulemaking docket, and that all such materials had in fact been properly docketed in this case (*id.* at 397-400).

With respect to the meetings, the court again noted that they were not prohibited by the Act; indeed, the court thought that such meetings were desirable given the importance of openness and accessibility on the part of public officials (657 F.2d at 400-401). The court further noted that summaries of seven of the nine contested meetings had been placed in the rulemaking docket, and held that this fully satisfied all statutory and due process requirements (*id.* at 386-410). A summary of one of the remaining two meetings was omitted from the docket through inadvertence. The court found that this was an honest error and that, in any event, the particular meeting was not of the type required to be entered on the rulemaking docket (*id.* at 404). The final meeting included the President and members of the White House staff. The court expressly recognized the President's constitutional authority to control and supervise executive policymaking and was hesitant to fashion any new rule that would impair the President's ability to fulfill this role (*id.* at 405-407). In this particular instance, the court found that because EPA did not base the rule on any information or data arising from the meeting, there was no justification for requiring it to be docketed on the rulemaking record (*id.* at 407).

Finally, the court noted that it could find no evidence of impermissible congressional pressure on EPA arising out of two meetings (both entered on the rulemaking docket) that the Administrator had with West Virginia Senator Robert Byrd. EDF's claim was rejected because it failed to present any evidence that Senator Byrd had sought to influence the rulemaking by injecting extraneous considerations into the Agency's decisionmaking processes (657 F.2d at 408-410).

2. After losing every issue on the merits, Sierra Club and EDF, relying on Section 307(f) of the Clean Air Act, filed motions seeking awards of attorneys' fees and costs. Although settlement discussions were initiated between respondents and the Justice Department lawyer then assigned to the litigation, no agreement was ever consummated because the Assistant Attorney General in charge of the matter declined to approve settlement. Thereafter, the fee requests were fully briefed by respondents and the government. Sierra Club and EDF both argued that an award of fees and costs was "appropriate" because they had conferred certain "public benefits" by bringing their unsuccessful lawsuits. Specifically, they contended that they had advanced the purposes of the Clean Air Act by enabling the court of appeals to construe the provisions of Section 111 of the Act, thus providing future guidance to EPA and the public as to how that provision should be interpreted and implemented. EDF also argued separately that litigation of the ex parte contacts issue had clarified the "rules of the game" as to contacts with Agency officials during informal rulemakings. The government opposed any fee award whatsoever because respondents had not only lost the litigation but failed to advance the purposes of the Clean Air Act in any concrete or tangible fashion.

On February 5, 1982, the court of appeals issued an opinion rejecting all the government's arguments in opposition to the motions for fees (Pet. App. 1a-20a).[3] After examining the text of Section 307(f) and its legislative history, the court concluded that an award of fees was "appropriate" where the party seeking fees had " 'substantially contributed' " to the goals of the Clean Air Act" (Pet. App. 20a n.10), whether or not the litigation was actually successful. The court further concluded that the "express" goals of the Clean Air Act included "prompt resolution of serious questions of statutory interpretation" (*id.* at 18a). A litigant could satisfy this goal, the court ruled, by making "exemplary" presentations on "important, complex and novel" issues (*id.* at 12a-13a; 18a-19a).

The court then suggested that the parties resume their negotiations over the proper amount of fees to be awarded, and ordered a status report on the negotiations within three months. In May 1982, the parties advised the court that their negotiations had been unsuccessful. Thereafter, Sierra Club and EDF filed amended fee requests encompassing their work on the

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[3] Actually, the court issued its opinion on January 22, 1982. That opinion was later withdrawn and a substitute opinion issued on February 5, 1982. On the same day, the court issued attorneys' fee decisions in *Alabama Power Co.* v. *Gorsuch*, 672 F.2d 1 (D.C. Cir. 1982), petition for rehearing pending, No. 78-1006, and *Environmental Defense Fund, Inc.* v. *EPA*, 672 F.2d 42 (D.C. Cir. 1982), petition for rehearing pending, No. 79-1580. The principal differences between the January and February opinions were that the February 5 opinion *added* a footnote responding to Judge Wilkey's dissent in *Alabama Power Co., supra*, 672 F.2d at 8-33, and *deleted* a passage cautioning that the amount of an award to "self-appointed representatives of the public interest" should be closely scrutinized.

case-in-chief and on the attorneys' fee dispute. On July 16, 1982, the court of appeals issued its final opinion (Pet. App. 23a-38a), in which a majority of the panel determined that Sierra Club was entitled to an award of $44,715 in fees and $644.60 in expenses, and that EDF was entitled to an award of $45,874.80 in fees. Although the court made modest reductions in the number of compensable hours claimed by respondents, the majority awarded fees at the hourly rates respondents had requested and rejected the government's argument that the awards should be reduced to reflect respondents' total lack of success on the merits (Pet. App. 26a-30a, 32a-35a). The majority stated that any such reduction could not be squared with "the Clean Air Act's overriding purpose of encouraging constructive legal challenges * * *" (*id.* at 30a). The court did, however, agree with the government that because of their failure to prevail respondents were not entitled to any "bonus" in addition to their "lodestar" fees (determined by multiplying the hours reasonably expended by a reasonable hourly rate) (*id.* at 30a-31a). Judge Robb dissented in part, asserting that a reduction in respondents' lodestar fees was "appropriate" because respondents had "batted zero" and "[i]f counsel were private practitioners their clients might well complain that they could have lost the case for less money" (*id.* at 36a-37a).

## SUMMARY OF ARGUMENT

1. By awarding attorneys' fees to parties who succeeded only in "airing" issues that EPA had already properly resolved, the court of appeals' decision represents an unprecedented departure from the well-established American Rule against fee-shifting and

extends far beyond any of the recognized equitable or statutory exceptions to that rule. When examined in light of Congress' customary practices with respect to attorneys' fees, it is clear that Section 307(f) does not, on its face, contain the requisite waiver of sovereign immunity required to support a fee award to totally unsuccessful litigants. For this reason alone, the court's interpretation of the statute must be reversed.

2. Moreover, examination of the legislative history only confirms that the court of appeals has far exceeded the limited waiver of sovereign immunity intended by Congress. The statutory provision at issue in this case, enacted in 1977 as Section 307(f) of the Clean Air Act (42 U.S.C. (Supp. IV) 7607), is modeled on the identical provision contained in Section 304(d) of the 1970 Clean Air Act, now recodified at 42 U.S.C. (Supp. IV) 7604(d). The legislative history of that section reveals that Congress authorized courts to award attorneys' fees when "appropriate" so that fees would be available to a plaintiff who succeeded in correcting a violation of the Act but did not obtain a final judgment. Because the then-existing caselaw interpreting "prevailing party" attorneys' fee provisions would not have permitted an award in such circumstances, Congress found it necessary to substitute the "appropriate" standard for the more customary "prevailing party" terminology. But nothing in the legislative history of the 1970 Act indicates that Congress anticipated or intended that fees would be available to parties that were not successful in any way.

In 1977, Congress added the "appropriate" attorneys' fee standard to Section 307 simply to bring that section into harmony with Section 304. But, notwithstanding Congress' obvious desire for uniformity, the

court of appeals concluded that Congress in 1977 intended to adopt the "far broader policy" (Pet. App. 4a-5a n.3) of rewarding substantial contributions to the goals of the statute, without regard to whether the litigation was in any way successful. The court's conclusion thus has the anomalous effect of creating two entirely different standards for attorneys' fee awards in the same statute, even though the language of the two provisions is identical. Equally important, the evidence cited by the court of appeals for its novel conclusion can hardly be characterized as "unequivocal." Instead, the court's decision rests entirely on a strained reading of ambiguous legislative history that is plainly insufficient to support the novel result reached.

3. The court of appeals justified its award of attorneys' fees to the Sierra Club and EDF on the ground that, although they did not succeed in correcting or improving EPA's implementation of the Clean Air Act in any way, they had "substantially contributed" to judicial interpretation of the statute. Although the court had affirmed EPA's interpretation of the statute in every respect, it held that judicial review was, in itself, an "express" goal of the Clean Air Act, and that by furthering that goal respondents had earned an award of attorneys' fees. Yet the only "express" goal of the Clean Air Act that is conceivably relevant to this case is the mandate "to protect and enhance the quality of the Nation's air resources * * *" (42 U.S.C. (Supp. IV) 7401(b)(1)). Quite clearly, respondents' unsuccessful litigation did nothing to promote that goal. And there is nothing in the statute or its legislative history to support the conclusion that Congress meant to fund litigation for its own sake. On the contrary, proposals for public interest funding considered by Congress contempo-

raneously with passage of Section 307(f) of the Clean Air Act clearly demonstrate that Congress thought the award of attorneys' fees to totally unsuccessful litigants would be "inappropriate."

## ARGUMENT

### I

### SECTION 307(f) OF THE CLEAN AIR ACT DOES NOT, ON ITS FACE, CONTAIN THE REQUISITE WAIVER OF SOVEREIGN IMMUNITY TO SUPPORT AN AWARD OF ATTORNEYS' FEES TO LOSING LITIGANTS

In applying Section 307(f) to this case, the court of appeals ignored the doctrine of sovereign immunity. That doctrine requires that Section 307(f) be strictly construed in the government's favor.

As sovereign, the United States is immune from claims for attorneys' fees, as it is immune from any other claims, except to the extent that it has waived its immunity. *Alyeska Pipeline Service Co.* v. *Wilderness Society*, 421 U.S. 240, 267-268 & n.42 (1975); *United States* v. *Testan*, 424 U.S. 392, 399 (1976). The Court has emphasized that such a waiver "cannot be implied but must be 'unequivocally expressed.'" *Army & Air Force Exchange Service* v. *Sheehan*, No. 80-1437 (June 1, 1982), slip op. 6, quoting *Testan*, *supra*; *United States* v. *Mitchell*, 445 U.S. 535, 538 (1980).

Where Congress has waived sovereign immunity, its waiver is to be "construed strictly in favor of the sovereign." *McMahon* v. *United States*, 342 U.S. 25, 27 (1951); *United States* v. *Kubrick*, 444 U.S. 111, 117-118 (1979); *United States* v. *Sherwood*, 312 U.S. 584, 590 (1941). Thus, in interpreting a statute that waives the immunity of the United States, the courts

should not "enlarge its liability * * * beyond what the language requires." *Eastern Transportation Co.* v. *United States*, 272 U.S. 675, 686 (1927). Strict construction conserves the public fisc and limits recovery to those situations in which it may confidently be concluded that Congress has determined that the government should be liable. See, e.g., *Indian Towing Co.* v. *United States*, 350 U.S. 61, 68-69 (1955).

The question in this case, therefore, is whether Congress, in authorizing attorneys' fee awards when "appropriate," clearly provided for fee awards to totally unsuccessful litigants. In examining the plain language of the statute, moreover, the context and background against which the term was chosen must be considered. As this Court concluded in *Lehman* v. *Nakshian*, 453 U.S. 156, 161-162, 168-169 (1981), interpretation of terms used in waivers of sovereign immunity must be informed by the usual practices of Congress.

In *Lehman*, the question presented was whether a congressional waiver of immunity authorizing "legal" relief against the United States included the right to trial by jury. This Court acknowledged that, in other contexts, a statutory provision for "legal" relief may encompass a right to a jury trial. 453 U.S. at 163. But, when viewed in the context of a waiver of sovereign immunity which historically is almost always accompanied by denial of the right to a jury trial, the use of the term "legal" did not convey the requisite express consent to jury trials. *Id.* at 161, 163. When the asserted waiver of sovereign immunity represents a radical departure from the usual practice of Congress, therefore, "[t]he appropriate inquiry * * * is whether Congress clearly and unequivocally" intended the change. *Id.* at 162.

This rule counsels special caution in reviewing the court of appeals' decision in this case. In general, attorneys' fees are not available to parties that do not prevail on any claim.[4] Indeed, the traditional American Rule "has long been that attorney's fees are not ordinarily recoverable" even by prevailing parties. *Fleischmann Distilling Corp.* v. *Maier Brewing Co.*, 386 U.S. 714, 717-718 (1967). This practice has frequently been contrasted to the rule in England, where the prevailing party, plaintiff or defendant, customarily recovers attorneys' fees. *Id.* at 717 & n.10.

Over the years, the courts have developed certain limited exceptions to the American Rule, permitting, for example, a fee award "to a successful party when his opponent has acted 'in bad faith, vexatiously, wantonly, or for oppressive reasons' " (*Hall* v. *Cole*, 412 U.S. 1, 5 (1973) (citations omitted)), or to spread the cost of "successful litigation" proportionately among the members of a benefitted class (*id.* at 5-6). In addition, as this Court noted in *Alyeska Pipeline Service Co.*, *supra*, 421 U.S. at 260, Congress has made "specific and explicit provisions for the allowance of attorneys' fees under selected statutes

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[4] Cf. *Alyeska Pipeline Service Co.*, *supra*, 421 U.S. at 247; *Hall* v. *Cole*, 412 U.S. 1, 4-7 (1973); *Delaware Citizens for Clean Air, Inc.* v. *Stauffer Chemical Co.*, 62 F.R.D. 353, 354-355 (D. Del. 1974), aff'd, 510 F.2d 969 (3d Cir. 1975). As Judge Wilkey stated in his dissenting opinion in *Alabama Power Co.* v. *Gorsuch*, 672 F.2d 1, 13 (D.C. Cir. 1982), petition for rehearing pending, No. 78-1006:

> All precedent and statute points to the fair conclusion that there is a general presumption against one side (particularly the winner) paying the other's attorneys' fees. Thus, when in doubt, no award will be made. Dramatic deviations from the American rule will be construed against. Similarly, there is a presumption that nonprevailing parties are not entitled to costs.

* * *."[5] Such statutes, however, generally address the concept of "fee-shifting" as it has always been understood, that is, transferring the burden of litigation costs from the successful party to the losing litigant. See *id.* at 261-263. Although these statutes "differ considerably among themselves" (*id.* at 261), the court of appeals in this case did not cite, and we have not found, any previous case, interpreting any of these statutes, in which attorneys' fees were awarded to a party that did not succeed in any way.[6]

Thus, the meaning of the term "appropriate" must be determined against the background of the American Rule and the various equitable and statutory exceptions which permit the burden of fees to be shifted to the losing party. Here, it is undeniable that,

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[5] Contrary to the federal rule established in *Alyeska*, 421 U.S. at 263, 269, the California courts have awarded fees to "private-attorney[s]-general" deemed by the courts to have accomplished a public service. See, e.g., *Serrano* v. *Priest*, 20 Cal. 3d 25, 569 P.2d 1303, 141 Cal. Rptr. 315 (1977). This judicially created doctrine has now been codified in California. Cal. Civ. Proc. Code § 1021.5 (West 1980); see *Woodland Hills Residents Association, Inc.* v. *City Council*, 23 Cal. 3d 917, 593 P.2d 200, 154 Cal. Rptr. 503 (1979). The threshold requirement for such awards, however, is and always has been success on the merits.

[6] Indeed, an early version of the bill that was to become the Equal Access to Justice Act, Pub. L. No. 96-481, 94 Stat. 2325, contained an explicit provision authorizing losing litigants to collect attorneys' fees from the government so long as the court found such awards to be "in the interest of justice." S. 2354, 95th Cong., 2d Sess. (1978). This provision was deemed a "radical" and "unacceptable" departure from current law (*Equal Access to Courts: Hearing on S. 2354 Before the Senate Subcomm. on Improvements in Judicial Machinery of the Comm. on the Judiciary*, 95th Cong., 2d Sess. 31 (1978)), and was eliminated from the bill prior to the hearing (*id.* at 50).

through Section 307(f), Congress has authorized some attorneys' fee awards against the government. See H.R. Rep. No. 95-294, 95th Cong., 1st Sess. 337 (1977) ("In adopting this provision concerning fees, the committee intended to meet the requirement for specific authorization imposed by 28 U.S.C. sec. 2412 and by the Supreme Court's ruling in *Alyeska* * * *"). But Congress' decision to subject the government to attorneys' fee awards under Section 307(f) does not mean that it has consented to awards for totally unsuccessful parties. Clearly, the language of Section 307(f) does not on its face specify that attorneys' fees may be assessed against the government in favor of losing litigants. Indeed, it seems most unlikely that such a radical departure from the American Rule against fee-shifting could have passed Congress with nary a mention, let alone a clear exposition of Congress' intent. And the legislative history of Section 307(f), to which we now turn, does not support the construction placed on the term "appropriate" by the court of appeals.

## II

### THE LEGISLATIVE HISTORY OF SECTION 307(f) SHOWS THAT CONGRESS INTENDED SOME MEASURE OF TANGIBLE SUCCESS AS A THRESHOLD REQUIREMENT FOR AN AWARD OF ATTORNEYS' FEES

Although it was not until 1977 that Congress provided for attorneys' fees in actions under Section 307, Congress first formulated the "appropriate" standard in Section 304(d) of the 1970 amendments to the Clean Air Act, 42 U.S.C. (Supp. IV) 7604(d). The events leading to the 1977 amendment to Section 307, and the legislative history of that amendment, dem-

onstrate that Congress simply intended to provide for Section 307 litigants the same entitlement to attorneys' fees that it had provided for Section 304 litigants in the 1970 Act. The legislative history of the 1970 Act, therefore, is critical to a proper understanding of Congress' intent.

In 1970, Congress provided for the award of attorneys' fees, when "appropriate," in citizens' suits to enforce the Act, brought under Section 304. Congress did not provide, however, for awards of attorneys' fees in actions brought under Section 307, which authorizes direct review in the courts of appeals of the Administrator's actions in promulgating regulations and approving state implementation plans. In *Natural Resources Defense Council, Inc.* v. *EPA*, 484 F.2d 1331 (1973), the First Circuit relied upon Section 304(d) to award attorneys' fees in an action brought under Section 307.[7] This extension of Section 304(d) was subsequently rejected by the Courts of Appeals for the Fifth and District of Columbia Circuits. *Natural Resources Defense Council, Inc.* v. *EPA*, 539 F.2d 1068 (5th Cir. 1976); *Natural Resources Defense Council,*

[7] The court found that that portion of Section 304 permitting suits against the Administrator for failure to perform a nondiscretionary duty would aptly cover the case before it, where the essence of the claim was that the Administrator failed to perform his duty with respect to the review and approval of state implementation plans. The court's problem, however, was that Section 304 citizens' suits may only be brought in district courts, whereas the case before the court had to be filed in the court of appeals under Section 307. The court concluded that Section 307 did no more than specify the forum, and that a suit brought under Section 307 was really an action pursuant to Section 304. Accordingly, the court concluded that Congress had given the necessary authorization for an award of attorneys' fees in actions brought under Section 307. 484 F.2d at 1335-1338.

*Inc.* v. *EPA*, 512 F.2d 1351 (D.C. Cir. 1975).[8] It was to overcome these latter rulings that Congress amended Section 307 in 1977, adding express authorization for the award of attorneys' fees in cases brought under that section whenever, as under Section 304(d), the court deemed such awards to be "appropriate." As the Senate Report explained (S. Rep. No. 95-127, 95th Cong., 1st Sess. 99 (1977)):

> The purpose of the amendment to section 307 is to carry out the intent of the committee in 1970 that a court may, in its discretion, award costs of litigation to a party bringing a suit under section 307 of the Clean Air Act.
>
> The law has been interpreted otherwise. Section 304 of the Clean Air Act specifically authorizes courts to award costs; however, section 307 did not contain a specific authorization. Courts have construed the absence of such authorization in section 307 to indicate congressional intent to prohibit a discretionary award of fees in section 307 suits.

It is thus clear that the purpose of the 1977 amendment to Section 307 was to conform that section to Section 304(d). The Court must therefore look to the history of Section 304(d) to determine the intended scope of the "appropriate" standard.

**A. The 1970 Legislative History**

In the 1970 Act, Congress authorized courts to award attorneys' fees in "appropriate" cases under Section 304(d), 42 U.S.C. (Supp. IV) 7604(d)—the

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[8] Those courts concluded that Sections 304 and 307 contemplated distinct groups of cases and that Section 304's attorneys' fee provision could not be engrafted onto Section 307 actions.

so-called citizens' suit provision of the Act. Section 304 allows citizens to bring enforcement actions directly against persons or entities alleged to be in violation of the Act or against the EPA Administrator for failure to perform a nondiscretionary duty. Its purpose was to supplement government enforcement efforts and motivate government agencies to take more vigorous enforcement actions themselves.

Through Section 304, Congress sought to enlist the aid of citizens in those situations where the government was not living up to its responsibilities.[9] It is against this backdrop that the Senate Report's explanation of the attorneys' fee provision in Section 304 (d) must be evaluated (S. Rep. No. 91-1196, 91st Cong., 2d Sess. 38 (1970) (emphasis added):

> Concern was expressed that some lawyers would use section 304 to bring frivolous and harassing actions. The Committee has added a key element in providing that the courts may award costs of litigation, including reasonable attorney and expert witness fees, whenever the court de-

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[9] As stated in S. Rep. No. 91-1196, 91st Cong., 2d Sess. 36-37, 38-39 (1970):

> Government initiative in seeking enforcement under the Clean Air Act has been restrained. Authorizing citizens to bring suits for violations of standards should motivate governmental agencies charged with the responsibility to bring enforcement and abatement proceedings.
>
> * * * * *
>
> The Committee bill would provide in the citizen suit provision that actions will lie against the Secretary for failure to exercise his duties under the Act, including his enforcement duties. The Committee expects that many citizen suits would be of this nature, since such suits would reduce the ultimate burden on the citizen of going forward with the entire action.

termines that such action is in the public interest.[10] The court could thus award costs of litigation to defendants where the litigation was obviously frivolous or harassing. This should have the effect of discouraging abuse of this provision, while at the same time encouraging the quality of the actions that will be brought.

The Courts should recognize that in bringing *legitimate actions* under this section citizens would be performing a public service and in such instances the courts should award costs of litigation to such party. This should extend to plaintiffs in actions which result in successful abatement but do not reach a verdict. For instance, if as a result of a citizen proceeding and before a verdict is issued, a defendant abated a violation, the court may award litigation expenses borne by the plaintiffs in prosecuting such actions.

In providing for attorneys' fees, Congress was thus focusing on two concerns. First, Congress wanted to protect defendants against the burden of frivolous lawsuits.[11] Second, Congress wanted to reward *legitimate* citizens' suits. In this case, the court of appeals apparently read "legitimate" to mean "important, complex and novel" (Pet. App. 13a). But it is clear

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[10] The Senate Report was discussing an earlier version of Section 304(d) that provided for attorneys' fee awards when the court determined that such an award would be in the "public interest." See S. 4358, 91st Cong., 2d Sess. (1970). The bill was later changed to authorize fees where "appropriate." There is no legislative history, however, to suggest that Congress meant anything substantive by the change.

[11] Thus, the first concern the "appropriate" standard was designed to deal with cuts against the award of fees in this case. Far from authorizing fees in favor of unsuccessful *plaintiffs*, the statute was designed to provide fees for successful *defendants*.

from a careful reading of the entire passage that "legitimate" can only have meant *successful*, for the next sentence of the report states that fee awards should "*extend* to plaintiffs in actions which result in successful abatement but do not reach a verdict" (S. Rep. No. 91-1196, *supra*, at 38) (emphasis added). If a "legitimate" action need only be one that unsuccessfully resolves novel questions, then quite clearly it would not be an "extension" to authorize fee awards to plaintiffs who accomplish a tangible pollution control benefit short of judgment.

In adopting the "appropriate" standard, Congress departed from the "prevailing party" and "substantially prevailing party" terminology it had used in other attorneys' fee provisions.[12] Although the court of appeals read this departure as proof that a litigant need not succeed to earn attorneys' fees, this interpretation is unfounded. "Prevailing party" was a term of art, accompanied by years of judicial interpretation. When Congress formulated the "appropriate" standard in 1970, attorneys' fees were awarded only to parties that had actually prevailed in court. See, e.g., *Ex parte Peterson*, 253 U.S. 300, 317-318 (1920); *Parham* v. *Southwestern Bell Telephone Co.*, 433 F.2d 421, 430 (8th Cir. 1970); *Best Medium Publishing Co.* v. *National Insider, Inc.*, 385 F.2d 384, 386 (7th Cir. 1967).[13] But in obviating the need for a

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[12] See, e.g., Civil Rights Act of 1964, 42 U.S.C. 2000a-3(b) ("prevailing party"); 42 U.S.C. 2000e-5(k) ("prevailing party"); Freedom of Information Act, 5 U.S.C. 552(a)(4)(E) ("substantially prevail[ing]" party).

[13] It was not until 1976, for example, that courts began awarding attorneys' fees to civil rights plaintiffs who "prevailed" by means of a settlement rather than a litigated judg-

plaintiff to "prevail" in the strictly technical sense of obtaining a judgment, Congress clearly retained some measure of success as the basis for an attorneys' fee award—a party still had to "win" in the sense of producing the desired result, albeit without a verdict. As Judge Wilkey put it in his dissent in *Alabama Power Co.* v. *Gorsuch*, 672 F.2d 1, 15, 19 (D.C. Cir. 1982), petition for rehearing pending, No. 78-1006, to be awarded attorneys' fees a party must at least not lose. A fair reading of the Senate Report thus demonstrates that "abatement without final judgment" represents the limits of a court's discretion to award fees to non-prevailing plaintiffs.[14]

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ment. See, e.g., *Foster* v. *Boise-Cascade, Inc.*, 420 F. Supp. 674 (S.D. Tex. 1976); *Richardson* v. *Civil Service Commission*, 420 F. Supp. 64 (S.D.N.Y. 1976); *Parker* v. *Mathews*, 411 F. Supp. 1059 (D.D.C. 1976); *Clanton* v. *Allied Chemical Corp.*, 409 F. Supp. 282 (E.D. Va. 1976). And it was not until 1976 that the courts awarded attorneys' fees to FOIA plaintiffs who "prevailed" or "substantially prevailed" simply because the government rendered their cases moot by releasing the documents in question. See, e.g., *Cuneo* v. *Rumsfeld*, 553 F.2d 1360 (D.C. Cir. 1977); *Vermont Low Income Advocacy Council, Inc.* v. *Usery*, 546 F.2d 509 (2d Cir. 1976); *American Federation of Government Employees* v. *Rosen*, 418 F. Supp. 205 (N.D. Ill. 1976); *Kaye* v. *Burns*, 411 F. Supp. 897 (S.D.N.Y. 1976). Thus, in 1970, Congress had to abandon the "prevailing party" and "substantially prevailing party" standards to ensure that attorneys' fees would "extend to plaintiffs in actions which result in successful abatement but do not reach a verdict." S. Rep. No. 91-1196, *supra*, at 38.

[14] The report states that fee awards under Section 304(d) "extend to" situations where plaintiffs accomplish a tangible benefit short of judgment; the report does not imply that a fee award is proper when a litigant merely raises novel but unsuccessful contentions (S. Rep. No. 91-1196, *supra*, at 38). The summary "section-by-section" analysis of the Senate Re-

Although the court of appeals recognized the limits of the language in the Senate Report, it nevertheless stated that it did "not read the Report as ruling out all other instances where attorneys' fees would be appropriate" (Pet. App. 4a n.3). Against the backdrop of sovereign immunity that should have informed the court's approach, however, it was not necessary for Congress to "rule out" categories of cases; rather, Congress must clearly and affirmatively "rule in" those situations in which it meant to authorize fee awards.[15] At least as of 1970, therefore, there is no support for the lower court's expansive reading of the "appropriate" attorneys' fee provision.

**B. The 1977 Legislative History**

As already explained, when, in 1977, Congress provided for attorneys' fees whenever "appropriate" under Section 307(f), its purpose was to conform

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port, however, states that a "court may award costs of litigation to either party whenever the court determines such an award is in the public interest without regard to the outcome of the litigation." S. Rep. No. 91-1196, *supra*, at 65. There is no elaboration on the meaning of "without regard to the outcome of the litigation" but, in light of the more complete explanation of congressional intent at page 38 of the Senate Report, there is no reason to believe that Congress intended any radical departure from the concept of awards to plaintiffs who accomplished something concrete, such as abatement of a pollution violation, yet failed to secure a favorable final judgment.

[15] The court of appeals thus used precisely the same type of legal analysis rejected by this Court in *Lehman*, *supra*. There, the Court held that the district court had erroneously relied on the *absence* of an "explicit refusal" by Congress to authorize jury trials in suits against the government. *Lehman*, *supra*, 453 U.S. at 159.

Section 307 to the standard established in Section 304(d) in 1970. S. Rep. No. 95-127, 95th Cong., 1st Sess. 99 (1977). Ignoring this legislative history, however, the court of appeals held that the 1977 amendment established a new and "far broader" standard for attorneys' fee awards (Pet. App. 4a n.3). To reach this conclusion, the court relied entirely on the 1977 House Report (H.R. Rep. No. 95-294, 95th Cong., 1st Sess. (1977)).[16] That report provides, in pertinent part (*id.* at 337):

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[16] In a footnote, the court pointed to two other portions of the 1977 legislative history to support its conclusion: the Senate's rejection of a proposal providing that attorneys' fees "shall" be awarded to any party that "prevails" and "may" be awarded to any party that "prevails in part"; and a Senate Committee staff analysis that asked whether it was necessary to "modify existing judicial practice" (Pet. App. 5a n.3).

The "prevailing party" proposal considered by the Senate was inflexible: it would have required an award of fees to whatever party prevailed, without regard to whether that party had furthered or frustrated the goals of the Act. Compare *Carpenter* v. *Andrus*, 499 F. Supp. 976, 978-979 (D. Del. 1980) (denying attorneys' fees to a successful plaintiff under the Endangered Species Act's "whenever * * * appropriate" provision, 16 U.S.C. 1540(g)(4), because the suit failed to "advance the statutory purpose"). The Senate's rejection of this proposal thus sheds little light on the proper interpretation of the provision ultimately adopted.

The Senate's apparent conclusion that "existing judicial practice" did not need to be "modified" also does not support the court's interpretation of Section 307(f). For, when Congress adopted Section 307(f), no court had ever awarded fees to a party that did not succeed in any way. See *Natural Resources Defense Council, Inc.* v. *EPA*, 484 F.2d 1331 (1st Cir. 1973) (petitioners had prevailed on most issues); *Citizens Association of Georgetown* v. *Washington*, 383 F. Supp. 136 (D.D.C. 1974), rev'd on other grounds, 535 F.2d 1318 (D.C. Cir. 1976) (district court awarded fees because

> The committee bill also contains express authority for the courts to award attorneys fees and expert witness fees in two situations.* The judicial review proceedings under section 307 of the act when the court determines such award is appropriate [sic].
>
> In the case of section 307 judicial review litigation, the purposes of the authority to award fees are not only to discourage frivolous litigation, but also to encourage litigation which will assure proper implementation and administration of the act or otherwise serve the public interest. The committee did not intend that the court's discretion to award fees under this provision should be restricted to cases in which the party seeking fees was the "prevailing party." In fact, such an amendment was expressly rejected by the committee, largely on the grounds set forth in *NRDC* v. *EPA*, 484 F.2d 1331, 1388 [sic] (1st Cir. 1973).
>
> * Such fees are already authorized to be awarded in suits brought under Section 304 of the Act.

The court of appeals believed this language "shows that Congress in 1977 specifically adopted the far broader policy of rewarding substantial contributions to the statutory goals of the Act" (Pet. App. 4a-5a n.3). The initial paragraph of this excerpt, however, like the 1977 Senate Report, simply demonstrates an intent to make Section 307 parallel the existing at-

plaintiffs were denied relief largely due to the city's failure to implement the statute, and the lawsuit was thus a necessary and helpful effort to galvanize the city to action). Indeed, the courts had expressly refused to award fees to parties that had not achieved any measure of success. *Delaware Citizens for Clean Air, Inc.* v. *Stauffer Chemical Co.*, 62 F.R.D. 353 (D. Del. 1974), aff'd, 510 F.2d 969 (3d Cir. 1975).

torneys' fee provision in Section 304(d). The court's conclusion that the 1977 amendments expanded the scope of the "appropriate" standard must therefore depend on the second paragraph, and that paragraph offers little support.

To be sure, the second paragraph limits itself to actions under Section 307, and does not mention Section 304 actions. This was, of course, quite natural, since Section 304 was left untouched. Yet, to conclude that this passage demonstrates an intent to expand the "appropriate" standard, one must find that, although it used the same terms, Congress meant to establish a different standard for Section 307 than it had established in Section 304. On its face, such a result seems irrational and, indeed, it cannot be squared with the Senate Committee's explicit intent to bring Section 307 into harmony with Section 304. Cf. *Northcross* v. *Memphis Board of Education*, 412 U.S. 427 (1973).

But besides this anomaly in the court's reasoning, the House Committee's language does not support the conclusion that Congress sought to establish a "far broader policy" for the award of attorneys' fees under Section 307. The House Report explains that attorneys' fees are authorized "to encourage litigation which will assure proper implementation and administration of the act * * *." H.R. Rep. No. 95-294, *supra*, at 337. But this phrase does not indicate that Congress intended that unsuccessful litigation could support an award of fees. Nor does the Committee's language suggest that the mere "airing" of new issues serves the public interest. To the contrary, litigation that promotes "proper implementation of the act" is quite obviously akin to the "legitimate" actions contemplated by Congress in 1970 (see pages 19-20, *supra*).

The lower court's expansive reading of the "appropriate" standard must thus rest upon the House Committee's explanation that it had rejected a " 'prevailing party' " standard "largely on the grounds set forth in *NRDC* v. *EPA*, 484 F.2d 1331, 1388 [sic] (1st Cir. 1973)." H.R. Rep. No. 95-294, *supra*, at 337. In *NRDC* v. *EPA*, the First Circuit addressed a very narrow question—should it award *any* fees to petitioners who had prevailed on most but not all of the claims they had raised. In resolving this issue in 1973, the court of necessity had to rely on the legislative history of Section 304(d) which, as we have noted, contemplated awards only to successful plaintiffs or to plaintiffs who accomplished something concrete short of judgment. Against this backdrop, the court stated (484 F.2d at 1338) (emphasis added):

> We are not impressed by the government's argument that because *some* issues were decided adversely to petitioners each party should bear its own costs. * * * We are at liberty to consider not merely "who won" but what benefits were conferred. The purpose of an award of costs and fees is not mainly punitive. It is to allocate the costs of litigation equitably, to encourage the achievement of statutory goals. When the government is attempting to carry out a program of such vast and unchartered [sic] dimensions, there are roles for both the official agency and a private watchdog. The legislation is itself novel and complex. Given the implementation dates, its early interpretation is desirable. It is our impression, overall, that petitioners, in their watchdog role, have performed a service.
>
> Were we to believe that the litigation were wholly or in substantial part frivolous, we would not, of course, award costs of any description to petitioners. In such cases, indeed, we reserve the

> right to award costs and fees in favor of the EPA. But the challenges here, even those not sustained, were mainly constructive and reasonable. *And petitioners were successful in several major respects; they should not be penalized for having also advanced some points of lesser weight.*

On its face, the First Circuit's opinion is far narrower than the court of appeals here suggested. NRDC *won* major portions of its case; nothing in the First Circuit's opinion suggests that fees would still have been awarded had NRDC failed to prevail on a single issue. The court's dictum about petitioners' useful "watchdog" role cannot be considered in isolation; rather, it must be examined in light of the government's contention that because NRDC lost *some* issues it should be denied *any* fee award. 484 F.2d at 1338. Only in this limited sense can the First Circuit be said to have rejected a "prevailing party" standard,[17] and there is nothing in the 1977 House Report's citation to *NRDC* v. *EPA* that suggests it meant to go beyond that holding. At the least, neither the House Report nor the First Circuit's opinion itself supports the conclusion that Congress meant to fund "watchdogs" when they raise a false alarm.

In its application of the "appropriate" standard to this case, the court of appeals seemed to rely primarily on the First Circuit's suggestion that "[w]e are at liberty to consider not *merely* 'who won' but what benefits were conferred. The purpose of an award of costs and fees is * * * to encourage the

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[17] At the time of the First Circuit's limited rejection of a "prevailing party" standard, that standard was still being narrowly construed by the courts. See pages 20-21 & note 13, *supra*.

achievement of statutory goals." *NRDC* v. *EPA*, *supra*, 484 F.2d at 1338 (emphasis added). But a fair reading of this passage suggests only a rejection of the rigidities of the "prevailing party" standard, permitting the courts flexibility to deny fees to parties who, though successful, did not further the goals of the statute. See note 16, *supra*. In no way does the First Circuit's language suggest that a party could further the achievement of statutory goals without obtaining any measure of success in the litigation.

Thus, even if one considers only the 1977 House Report from which the court of appeals derived its interpretation of Section 307(f), the court's award of attorneys' fees to totally unsuccessful parties is supported only by tenuous inferences from the Committee's admittedly ambiguous explanations. And when one considers all the available evidence of Congress' intent, in the legislative histories from both 1977 and 1970, it is clear that Congress never anticipated the court of appeals' sweepingly expansive interpretation of the "appropriate" standard.[18] In any

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[18] The legislative histories of other statutes containing "appropriate" attorneys' fee provisions are fully consistent with the government's view of the Clean Air Act. For example, the legislative history of Section 505(d) of the Clean Water Act, 33 U.S.C. 1365(d), shows that Congress specifically intended Section 505(d) to be interpreted similarly to Section 304(d) of the Clean Air Act. The House Report merely states this fact. H.R. Rep. No. 92-911, 92d Cong., 2d Sess. 132-133 (1972). The Senate Report, S. Rep. No. 92-414, 92d Cong., 2d Sess. 81 (1972), reiterates the rationale of Section 304(d) of the Clean Air Act in language virtually identical to the Senate Report on the Clean Air Act. Thus, the twin purposes of Section 505(d) of the Clean Water Act are to punish frivolous or harassing litigants and to reward citizens' suits that

circumstances, such scant support in the legislative history would compel the conclusion that Congress had not "unequivocally expressed" an intent to waive sovereign immunity. But that conclusion is inescapable

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result in pollution abatement but fail to reach a verdict. The attorneys' fee provision of the Safe Drinking Water Act, 42 U.S.C. 300j-8(d), has in its legislative history no purpose except "[as] a deterrent against frivolous suits." S. Rep. No. 93-231, 93d Cong., 1st Sess. 17 (1973). The legislative history of the attorneys' fee provision in the Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. (Supp. IV) 1270(d), specifically adopts the legislative history of Section 505(d) of the Clean Water Act. H.R. Rep. No. 95-218, 95th Cong., 1st Sess. 90-91 (1977). The legislative history of the Toxic Substances Control Act's attorneys' fee provision, 15 U.S.C. 2618(d), construed by the court of appeals in *Environmental Defense Fund, Inc.* v. *EPA*, 672 F.2d 42 (D.C. Cir. 1982), petition for rehearing pending, No. 79-1580, is likewise fully consistent with the government's position herein. Although the court of appeals in *EDF* relied heavily on a statement by Senator Tunney that fee awards under TSCA would be appropriate "where such award is in the public interest without regard to the outcome of the litigation," 122 Cong. Rec. 8301 (1976), the court of appeals failed to analyze the cases Senator Tunney cited in support of that proposition. None of the four cases comes even remotely close to suggesting the appropriateness of an award for the mere airing of losing issues. Rather, in all four cases, plaintiffs "prevailed" either in fact or by obtaining a concrete, tangible benefit for themselves or the class they represented in the form of a definite change in the defendant's conduct. *Kopet* v. *Esquire Realty Co.*, 523 F.2d 1005, 1008-1009 (2d Cir. 1975); *Parham* v. *Southwestern Bell Telephone Co.*, 433 F.2d 421, 429-430 (8th Cir. 1970); *Thomas* v. *Honeybrook Mines, Inc.*, 428 F.2d 981, 985 (3d Cir. 1970); *Richards* v. *Griffith Rubber Mills*, 300 F. Supp. 338 (D. Ore. 1969). The court of appeals in *EDF* also glossed over Senator Tunney's statement that "the court should follow prevailing case law which holds that a *successful* plaintiff 'should ordinarily recover an [sic] attorneys' fees' * * *." 122 Cong. Rec. 8300 (1976) (emphasis added).

where, as here, the asserted waiver would work a virtual revolution in the traditional doctrines of attorneys' fees. For it cannot fairly be assumed that Congress effected such a revolution without a whisper of explanation or controversy.

## III

### RESPONDENTS WERE IMPROPERLY AWARDED ATTORNEYS' FEES FOR MERE PARTICIPATION IN JUDICIAL REVIEW PROCEEDINGS UNDER THE CLEAN AIR ACT AND NOT FOR FURTHERING THE GOALS OF THAT STATUTE

The court of appeals held that an award of attorneys' fees to Sierra Club and EDF was "appropriate" because those parties had " 'substantially contributed' to the goals of the Clean Air Act" (Pet. App. 20a, n.10). As we explained in the preceding section, the courts should indeed consider whether a litigant has contributed to the goals of the Act in determining whether fees are "appropriate," but such a contribution is a requirement in addition to, and not a substitute for, some measure of success in the underlying litigation. See *Carpenter* v. *Andrus*, 499 F. Supp. 976 (D. Del. 1980). In any event, the "substantial contributions" rewarded by the court below did not serve the goals of the Clean Air Act.

The Clean Air Act, in pertinent part, establishes a single goal: "to protect and enhance the quality of the Nation's air resources * * *" (42 U.S.C. (Supp. IV) 7401(b)(1)).[19] But the court of appeals did not

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[19] Section 101(b) of the Clean Air Act, 42 U.S.C. (Supp. IV) 7401(b) sets forth the purposes of the Act:

> (b) The purposes of this subchapter are—
>
> (1) to protect and enhance the quality of the Nation's air resources so as to promote the public health

even suggest that Sierra Club and EDF had furthered this objective. Rather, the court found that "prompt resolution of serious questions of statutory interpretation" was also a goal of the statute (Pet. App. 18a). Because Sierra Club and EDF raised issues that "deserved to have been aired" (*id.* at 16a), the court held, they were entitled to fees.

But although the court asserted that judicial interpretation was an "express goal" of the Clean Air Act, it did not point to anything in the statute that supports its conclusion.[20] And surely, unless one views

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and welfare and the productive capacity of its population;

(2) to initiate and accelerate a national research and development program to achieve the prevention and control of air pollution;

(3) to provide technical and financial assistance to State and local governments in connection with the development and execution of their air pollution prevention and control programs; and

(4) to encourage and assist the development and operation of regional air pollution control programs.

[20] The legislative history of Section 307 of the Clean Air Act completely belies the court of appeals' conclusion that prompt judicial interpretation is a "goal" of the statute. Rather, the legislative history reveals that Congress did not wish to completely foreclose judicial review of agency action. It realized, however, that unrestrained judicial review of nationwide regulations or EPA approvals of state implementation plans could seriously undermine uniformity of interpretation throughout the nation and play havoc with the strict time sequences established in the Act. See S. Rep. No. 91-1196, *supra*, at 40-41. For these reasons, it established a 30-day statute of limitations on judicial review and limited the forums in which review might be sought. *Ibid.*

This history does not evidence a congressional intent to encourage judicial interpretation as an end in itself. Instead,

litigation as desirable for its own sake, it is difficult to comprehend how implementation of the Act is furthered when a court finds, in the course of interpreting the Act's provisions, that the Agency was already implementing it correctly. The lower court suggested that such affirmation of the Agency's actions yields important public benefits: "by assisting judicial interpretation of the Clean Air Act, Sierra Club and EDF aided agency implementation and Congressional reevaluation of the Act" (Pet. App. 8a). Yet, where "agency implementation" of the Act is found to be in full accord with congressional intent, it is difficult to appreciate how it is aided by judicial assent. Surely, Congress has ample tools at its command to conduct its own reevaluation of the Act; nowhere in the legislative history is there any support for the notion that Congress thought it needed the assistance of litigants who press unsuccessful claims.

The court found that the award of fees to EDF and Sierra Club was somehow bolstered by the "substantial nature of [their] assistance" to the court's review of the regulations (Pet. App. 16a). But this rationale is, to say the least, debatable.[21] For example,

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it recognizes that, absent complete preclusion of judicial review, legal challenges to agency action were inevitable and should therefore be limited in time and place to avoid damaging the structure of the Clean Air Act.

[21] It is also worth noting that the court of appeals' estimation of respondents' contribution to the litigation increased markedly between the time it rendered its decision on the merits and its opinion on fees. For example, in awarding fees, the court praised EDF for assisting the court's deliberations on the ex parte contacts issue. In *Sierra Club* v. *Costle*, however, the court stated that "[t]he parties," presumably including EDF, did not make the court's task of identifying the actions and incidents that gave rise to EDF's complaints "an easy

the court noted that it was "totally dependent upon Sierra Club to brief and advocate the opposition to a variable standard" (Pet. App. 17a). Yet, absent Sierra Club's ill-founded challenge, there would have been no need for the court even to consider the variable standard. And surely the fact that a litigant's position, though wrong, was competently presented does not make fee-shifting somehow appropriate. Competent representation is nothing more than every litigant's obligation to the courts.

Similarly, the court found that EDF's contributions expedited and "enriched" its consideration of the ex parte contacts issue, and allowed the court to "resolve close questions of interpretation for future rulemaking under the Act" (Pet. App. 18a). But, of course, that consideration too was only necessary because EDF raised the issue in the first place. And

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one." 657 F.2d at 386 n.423. The court also stated (*id.* at 391):

> EDF does not specify which particular features in each of the above-enumerated communications violated due process or constituted errors under the statute; indeed, EDF nowhere lists the communications in a form designed to clarify why any particular communication was unlawful. Instead, EDF labels all post-comment communications with EPA—from whatever source and in whatever form—as "ex parte," and claims that "this court has repeatedly stated that ex parte contacts of substance violate due process."

As noted, the court rejected EDF's position in its entirety. Similarly, the court had no difficulty rejecting Sierra Club's construction of the statute. The court found the language of the statute itself to be relatively clear (*id.* at 319), and concluded that it "critically undercut[]" Sierra Club's position (*id.* at 318). The court found Sierra Club's arguments based on the legislative history no more persuasive (see generally, *id.* at 319-322).

nothing in the Act suggests that Congress meant to pay litigants to resolve questions for the benefit of future rulemakings; to the contrary, Congress rather clearly left that task to the Agency in the first instance.[22]

It is thus apparent that, although the court of appeals purported to reward "public benefits," it has, in effect, granted attorneys' fees for mere participation in judicial review of agency rulemakings. Although such participation may have some value to the court, its does not in itself further any goal of the Clean Air Act, because it does not in any way improve the implementation of that statute. And there is no evi-

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[22] The court of appeals suggested that attorneys' fees were "appropriate" because its decision "apparently provided fuel for discussion about appropriate restrictions on ex parte comments in other administrative proceedings" (Pet. App. 18a). This claim rests entirely on a memorandum of David Stockman, dated June 11, 1981 (J.A. 30-31). The memorandum outlines the roles of the Presidential Task Force on Regulatory Relief and the Office of Management and Budget in agency rulemakings and notes that the procedures therein described will be consistent with the court of appeals' merits decision in this case. There is no indication anywhere in the memorandum, however, that that decision in any way altered the procedures previously employed. And, considering that the court below found that EPA and OMB were already complying with these requirements, there is no reason to believe that any change was effected by this memorandum.

The court also found that Sierra Club and EDF had "effectively supplemented" EPA's defense of its regulations against industry challengers (Pet. App. 7a n.5). But it was Congress' clear intent that EPA and the Department of Justice should defend the regulations promulgated under the Clean Air Act. It is incongruous to assume that Congress also intended to award attorneys' fees to litigants who take it upon themselves to supplement that effort. See *Alabama Power Co.* v. *Gorsuch*, *supra*, 672 F.2d at 4.

dence, either in the statute or in the legislative history, that Congress intended to fund such participation through the award of attorneys' fees.

Indeed, when Congress has considered funding the mere presentation of views, it has spoken clearly. Thus, for example, Congress has expressly authorized EPA to award attorneys' fees for participation in rulemakings under the Toxic Substances Control Act (TSCA), 15 U.S.C. 2605(c)(4)(A). That statute clearly demonstrates that Congress knew how to draft language awarding fees for the mere presentation of issues and viewpoints, whether or not those viewpoints were ultimately adopted.[23] Such funding is rare, however, and it has *never* been extended to unsuccessful participants in judicial review proceedings.[24] The court of appeals thus committed a funda-

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[23] Under the statute, a rulemaking participant may be awarded fees if that participant "represents an interest which would substantially contribute to a fair determination of the issues to be resolved in the proceeding." 15 U.S.C. 2605(c)(4)(A)(i). In deciding what persons represent such an interest, EPA is to take into account "the number and complexity of such issues and the extent to which representation of such interest will contribute to widespread public participation in the proceeding and representation of a fair balance of interests for the resolution of such issues." 15 U.S.C. 2605(c)(4)(A). Clearly, these statutory directives make it appropriate for EPA to compensate persons whose contribution to the public interest lies simply in adding to the variety of public debate on an issue. Nothing remotely comparable can be read into the "appropriate" standard at issue in this case.

[24] Contemporaneously with passage of the 1977 amendments to the Clean Air Act, Congress considered and rejected proposals to fund public participation in agency proceedings through grants of attorneys' fees and other costs. See S. 270 and H.R. 3361, 95th Cong., 1st Sess. (1977). What is striking about these proposals is the sharp distinction drawn between

mental error in concluding that, by providing for attorneys' fees in Section 307(f) of the Clean Air Act "whenever appropriate," Congress intended, sub silentio, to extend such extraordinary benefits to unsuccessful litigants. Certainly, such an intent has not been "unequivocally expressed." Accordingly, Section 307(f) should not be read to authorize an award of attorneys' fees to parties whose sole contribution to the "goals" of the Clean Air Act was the presentation, however competent, of erroneous legal arguments on the meaning of the statute.

Congress assigned to EPA the expensive, time-consuming and important responsibility of implementing the Clean Air Act. When EPA missteps, Congress has encouraged private litigants to invoke judicial review to put the agency back on course. But

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participation in agency proceedings themselves and court actions reviewing agency decisions. Participation fees in rulemaking, ratemaking, licensing or other agency proceedings of importance to the public at large were proposed on the theory that diverse viewpoints would lead to better informed and more defensible agency actions. See *Public Participation in Agency Proceedings: Hearings on H.R. 3361 and Related Bills Before the House Subcomm. on Administrative Law and Governmental Relations of the Comm. on the Judiciary*, 95th Cong., 1st Sess., Pt. 2, 35 (1977). These public benefits are not reaped by mere participation in judicial review proceedings that take place after final agency action has been completed. Accordingly, in the case of judicial review, the proposals would have authorized fees only when "the court affords such person the relief sought in substantial measure or, after the filing of such action, the agency affords such person the relief sought in substantial measure." S. 270, *supra*, § 707(b). *In addition*, the court had to find that the litigation "served an important public purpose." *Ibid.* See also, *Public Participation in Agency Proceedings: Hearings on H.R. 3361*, Pt. 2, *supra*, at 35. Thus, the sponsors of these proposals obviously felt that funding unsuccessful litigation would be "inappropriate."

where EPA has not strayed, there is little logic in the assumption that Congress intended to pay "self-appointed representatives of the public interest" for validating the agency's fulfillment of Congress' purposes.[25] Respondents were, of course, free to take their disagreements with the Agency's approach to court, but they should not expect the government to pay them for having its course of action vindicated. Rewarding litigants who actually aid agency implementation by using the judicial process to correct administrative errors is more than sufficient incentive for the type of citizen involvement in the implementation of the Clean Air Act contemplated by Congress. Rewarding unsuccessful litigants who do no more than vindicate the Agency's approach to the statute not only does nothing to assist implementation of the Act but, on the contrary, frustrates that purpose by diverting scarce Agency resources from pressing needs. By allowing fees in such cases, the court has divorced the attorneys' fee provision from any discernible congressional goals, to subsidize assistance in the mere "refinement of jurisprudential understanding." *Valley Forge Christian College* v. *Americans United for Separation of Church & State, Inc.*, No. 80-327 (Jan. 12, 1982), slip op. 8.

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[25] *Natural Resources Defense Council, Inc.* v. *EPA*, 484 F.2d 1331, 1338-1339 (1st Cir. 1973).

## CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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DECEMBER 1982

☆ U. S. GOVERNMENT PRINTING OFFICE: 1982 393254 1181